No. 83-18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DUN & BRADSTREET, INC.,

Petitioner,

—against—

GREENMOSS BUILDERS, INC.,

Respondent.

BRIEF OF DOW JONES & COMPANY, INC. AS *AMICUS CURIAE*, IN SUPPORT OF PETITIONER

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Dow Jones & Company, Inc. ("Dow Jones") respectfully submits this brief as *amicus curiae* in support of petitioner's claim that the libel judgment against it for presumed and punitive damages violates the First and Fourteenth Amendments to the Constitution. Pursuant to Rule 36.2 of the Rules of this Court, the parties to this case have given their written consent to the filing of this brief. Copies of the letters of consent have been filed with the Clerk.

INTEREST OF THE AMICUS

Dow Jones is engaged in a variety of enterprises to gather and disseminate news, opinion and information. It publishes *The Wall Street Journal*, a daily newspaper distributed nationally with separate editions in Europe and Asia, which

emphasizes economic, financial and commercial news and information, and also reports political and general interest news, commentary and opinion. *The Wall Street Journal* has the largest circulation of any daily newspaper in the United States. Dow Jones is also the publisher of *Barron's National Business and Financial Weekly*, a publication containing facts and opinions of particular interest to investors. Through subsidiaries, Dow Jones publishes twenty-two regional and local newspapers in many sections of the country, and books, primarily on economic, business and financial topics.

Dow Jones is also involved in dissemination of information through a variety of electronic means. The Dow Jones News Service, frequently called the "Dow Jones ticker" or the "broad tape," electronically distributes to its subscribers up-to-the-minute reports of stock information, corporate developments (including bankruptcies), national and international business highlights, and other news of interest to its subscribers. The information disseminated by the News Service is generated in large part by reporters for *The Wall Street Journal*, but the News Service also has its own staff of reporters who obtain information directly from corporations and other sources; the information distributed on the News Service is edited by the News Service's own editorial staff. Subscribers to the Dow Jones News Service have the options, among others, either of obtaining their own "hard copy" of the Service on a printer leased by Dow Jones, or of receiving the News Service on a television-like cathode ray tube monitor available from several independent companies that facilitate the transmission of electronic information.

The Dow Jones News/Retrieval Service provides its subscribers, for a fee, with access to twenty-eight information data bases. At present, one data base consists of information that has appeared in *The Wall Street Journal* or *Barron's* or has been transmitted over the Dow Jones News Service during the previous 90 days. The News/Retrieval Service permits its subscribers to search the data bases for information responsive to the subscribers' requests and to retrieve that information, either in print form or on a cathode ray tube monitor.

Because of its involvement in many forms of news and information dissemination, and because of its actual and potential exposure to libel litigation in which punitive and presumed damages are sought, Dow Jones has a profound interest in the questions before the Court in this case. This Brief will focus on the two questions posed in the Court's order of July 5, 1984, restoring this case to the calendar for reargument.

SUMMARY OF ARGUMENT

In its order of July 5, 1984, the Court asked the parties to address the questions whether "in a defamation action, the constitutional rule of *New York Times* and *Gertz* with respect to presumed and punitive damages should apply where the suit is against a non-media defendant" and "where the speech is of a commercial or economic nature?" *Amicus* submits that the answer to each question is emphatically in the affirmative.

This Court has already rejected the proposition that different categories of speakers receive different degrees of protection under the First Amendment simply because of their status. There is thus no reason or justification to apply a different First Amendment analysis merely because the defendant in a defamation action is considered "media" or "non-media." Moreover, the distinction between "media" and "non-media," in the defamation context, is becoming daily more difficult to draw. Companies such as Dow Jones are no longer limited to the traditional print media, but are increasingly involved in electronic forms of communication that are interactive, multi-functional and extraordinarily diverse. The Court should not hinge critical constitutional protections in the libel field, such as the *Gertz* rule on presumed and punitive damages, on present-day perceptions of what constitutes "the media," for those perceptions—and any bright line of demarcation between "media" and "non-media"—will inevitably become obsolete.

On the second question, speech "of a commercial or economic nature" is entitled to the full protection of the First and Fourteenth Amendments, including the protections articulated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). This Court has rejected the proposition that the freedoms of speech and of the press apply differently when the subject matter of the speech involved happens to concern "economic" or "commercial" topics. While the Court has developed a special analysis for so-called "commercial speech," holding that such speech is entitled to a lesser degree of First Amendment protection than other expression, it has been careful to define "commercial speech" to be something different from (and far more limited than) speech about commerce.

"Commercial speech," in the sense used by the Court to describe speech in the less-protected category, is limited to "speech proposing a commercial transaction," *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978), or speech that "does 'no more than propose a commercial transaction.'" *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976), quoting *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 385 (1973). The communication involved in this case—a "special notice" sent by Dun & Bradstreet to five of its subscribers reporting (incorrectly, as it turned out) respondent's bankruptcy—was in no sense "speech proposing a commercial transaction," nor did its content relate in any way to any business or activity in which Dun & Bradstreet itself had an interest. It was nothing more than a transmission of information from a publisher of information to readers with an interest in receiving the information. The limited protection of the commercial speech cases does not apply, and should not be extended to apply, to informational communication. Such expression should receive full First Amendment protection irrespective of the "nature" of the speech.

In any event, the "commercial speech" decisions of this Court—and the reasoning and tests articulated in those decisions—are inapplicable to a defamation case such as this. The commercial speech cases have dealt with regulatory efforts by federal, state or local agencies to ban, restrict or regulate economic activity. The doctrine was developed because new rules were necessary to limit the states' otherwise unquestioned right to regulate commercial and economic affairs when doing so affected activity that consisted (in whole or in part) of speech. But the "commercial speech doctrine" has never been applied by this Court in a defamation action.

More importantly, the analysis employed by the Court in the commercial speech cases is singularly inappropriate and unhelpful in determining the limits imposed by the First and Fourteenth Amendments on defamation suits in general, and on presumed or punitive damages in particular. Rather, the proper balancing of the legitimate interests of a defamation plaintiff with the values protected by the First and Fourteenth Amendments was established more than a decade ago by the Court in *Gertz v. Robert Welch, Inc.*, *supra*, 418 U.S. 323. The commercial speech decisions do not limit, or even apply to, the *Gertz* rule.

Finally, Dow Jones joins in the argument of fellow *amicus The Washington Post* that the award of presumed or punitive damages in a defamation action constitutes a profound threat to free expression and therefore violates the First and Fourteenth Amendments irrespective of whether a jury finds the plaintiff has established "actual malice" on the part of the defendant.

ARGUMENT

I. The Constitutional Protections of *Gertz* Should Not Depend on Whether the Speaker is "Media" or "Non-media"

This Court has ruled, in several contexts, that the protections of the First Amendment cannot be diminished simply because of the status of the person or entity claiming those protections. *See, e.g., First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978), in which the Court noted:

> The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.

Indeed, the First Amendment focuses as much on the interest of the listener (and on the process of communication itself) as on the interest of the speaker. *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc., supra*, 425 U.S. at 756-57. Thus, while "the media" or "the press" may require special First Amendment treatment when their unique function is at issue,[1] in a defamation action the

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1 *Amicus* submits that "media"/"non-media" or "press"/"speech" distinctions may be required in certain contexts. Thus, for example, a commercial advertisement will likely be treated as "commercial speech" subject to certain kinds of regulation in the hands of the advertiser, but not in the hands of the newspaper publisher. This is so because, from the viewpoint of the advertiser, a particular advertisement partakes of what Justice Blackmun, for the Court, called the "commonsense differences" between "commercial speech" and other expression, *i.e.*, greater ease of verification and less "likelihood of its being chilled by proper regulation and foregone entirely." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra*, 425 U.S. at 771-72 n.24.

From the viewpoint of the press, however, publishing the same commercial advertisement does not differ significantly from publishing other material. There is no inherently greater ease of verification by the publisher of advertising claims than there is with respect to other factual material that it publishes. And, particularly in light of the press' virtually absolute right to reject advertising, there is a substantial likelihood of "chill" resulting from any governmental regulation that imposes potential liability on the press. *See generally* A. Hill, *Defamation and Privacy Under the First Amendment*, 76 Colum. L. Rev. 1205, 1223 (1976). *Cf. Bigelow v. Virginia*, 421 U.S. 809, 828-29 (1975).

In other contexts, too, it is submitted that a distinction between those who are exercising a press function (including, perhaps, Dun & Bradstreet) and those who are not may be required. *Amicus'* observations on this issue are contained in R. Sack, *Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press*, 7 Hofstra L. Rev. 629 (1979).

constitutional rule developed in *Gertz* should apply irrespective of the status of the speaker.

In any event, the distinction between a "media" and a "non-media" defendant cannot easily or fruitfully be applied in defamation cases; it is almost certain to be an unworkable concept in the future development of defamation law. As described in the *amicus* brief of the Information Industry Association, we live in a time of explosive growth in communications technology that promises entirely new methods of disseminating raw data, news and opinion. One scholar has recently canvassed these technological developments and probable developments with particular reference to their implications for traditional concepts of media protection and regulation, and concluded that virtually all our current attitudes toward media communications must change to accommodate the revolution wrought by that development. I. Pool, *Technologies of Freedom* 212-17 (1983).

One need not await the future, however, to see the difficulties that a "media"/"non-media" distinction in the defamation context would inevitably raise. News of bankruptcy filings, for example, is highly significant. It is frequently carried in the pages of *The Wall Street Journal*. (Recent Chapter XI petitions by Air Florida and Charter Co. are illustrative.) It is "newsworthy" largely because of the economic impact bankruptcy

proceedings are likely to have on creditors, employees, shareholders and others. There can be no doubt, as discussed in Point II below, that such reports are entitled to full constitutional protection under the rules enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.*, *supra*, 418 U.S. 323.

Such *Wall Street Journal* information is now stored in the Dow Jones News/Retrieval data base subsequent to its publication in the *Journal*, where it is available for retransmission to the five, fifty or five thousand subscribers who may happen, electronically, to demand it. In the future, at least some such information may by-pass publication in the *Journal*, and be sent directly to and be stored in a data base. When any such information is supplied to inquiring subscribers, its dissemination fulfills precisely the same function it does when it is published in the newspaper. As with print publication, it is disseminated because of the economic impact it is likely to have—on creditors, employees, shareholders and others—and their consequent interest in the information. Electronic dissemination is used simply because it is more efficient and therefore ultimately more economical than traditional means, and because it offers the advantages of user selectivity and continuous, instantaneous updating.

If publications about bankruptcies in print publications are constitutionally protected—as they are (see Point II, below)—it is impossible to understand why parallel electronic publication should not or would not be. Yet, the implications of the Vermont Supreme Court's opinion below are directly to the contrary: Dun & Bradstreet's activity held by the Vermont Supreme Court to be without the constitutional safeguards set forth in *Gertz* appears to be indistinguishable, for legal purposes, from the kind of electronic publishing in which Dow Jones and many others now engage.[2]

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2 This is not to say that States, under the latitude allowed to them under *Gertz*, are unable to make legal distinctions based on the different characteristics of the various media. Thus, for example, a defamed party may be expected to become immediately aware of a defamatory utterance in the printed press, whereas a substantial period of time may elapse before the same party becomes aware of defamatory material contained in a data base. There would presumably be no constitutional impediment for state law to recognize this factor by holding that defamation statutes of limitation run from the date of publication in the case of print or broadcast media, but from the date the plaintiff could reasonably have discovered it in the case of data-base (or credit information) defamation. *See generally Holloway v. Butler*, 662 S.W.2d 688 (Tex. Civ. App. 1983); *McGuiness v. Motor Trend Magazine*, 129 Cal. App.3d 59, 180 Cal. Rptr. 784 (Cal. Ct. App. 1982), and cases cited therein. Similarly, certain requirements of access to potentially defamatory material by its subjects that might present constitutional problems in the print context, *see Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), may be permissible where data-base (or credit information) publishing is concerned.

Thus, it is submitted that either the "media"/"nonmedia" distinction is not viable in this context, or the term "media" must be broadened to include all those who gather and disseminate information—including data-base publishers like Dow Jones and including petitioner Dun & Bradstreet in the case at bar.

II. The Dissemination of Information is Entitled to Undiluted First Amendment Protection Whether or Not its Subject Matter Concerns "Commerce" or "Economics"

Beginning as early as *Valentine v. Chrestensen*, 316 U.S. 52 (1942), and more recently in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, *supra*, 425 U.S. 748, and subsequent cases, the Court has delineated a category of "commercial speech" that has "less protection" than "other constitutionally safeguarded forms of expression." *Bolger v. Youngs Drug Products Corp.*, ___ U.S. ___, 103 S. Ct. 2875, 2879 (1983). The Court has been careful, however, to define precisely what it means by "commercial speech," and to warn that "the speech whose content deprives it of protection cannot simply be speech on a commercial subject." *Virginia State*

Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., *supra*, 425 U.S. at 761.[3]

"Commercial speech" is speech that "does 'no more than propose a commercial transaction.' " *Id.* at 762, quoting *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, *supra*, 413 U.S. at 385. Like contract terms, or a statement in a securities prospectus that is subject to federal regulation, the status of such speech in the less-protected category of "commercial speech" derives not from the identity of the words or their capacity to convey information but from their function: They are themselves acts. For this reason, the regulatory statutes and administrative provisions involved in the "commercial speech" cases did not purport to adjudicate between "true" and "false" statements, but rather regulated statements incidentally made in furtherance or as part of commercial activity as an element of the State's right to regulate the activity itself.[4]

By contrast, the Dun & Bradstreet communication in this case and the dissemination of information in which Dow Jones is involved do not "propose a transaction," nor do they constitute a legal, commercial or economic act. Unlike the

3 The Court has also warned against the "risk of broadening a category of unprotected speech." *Bose Corp. v. Consumers Union of United States, Inc.*, ___ U.S. ___, ___ S. Ct. ___, 52 U.S.L.W. 4513, 4519 n.23 (April 30, 1984).

4 The application of certain statutes and regulations to conduct that includes speech, of course, may involve determining whether or not that speech was false or misleading. For example, the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder by the Securities & Exchange Commission, 17 C.F.R. § 240.10b-5 (1983), prohibit a "device, scheme or artifice to defraud" and thus may penalize knowingly false or misleading statements that induce another to buy or sell a security in violation of the Act. But the statute and rule themselves do not regulate untruthful information, nor do they require a distinction between truthful and untruthful speech. Rather, their focus is on whether there has been a "scheme to defraud." It is the act or conduct involved—the "scheme"—not the content of the speech itself, that is the legitimate focus of the government's regulatory effort.

advertisers in all of the commercial speech cases, Dun & Bradstreet had no economic interest in the subject matter of its communication other than—like the *New York Times* in *New York Times Co. v. Sullivan*, *supra*, 376 U.S. 254—as its publisher. The communication is informational rather than propositional, its words have no intrinsic legal significance, and its alleged impact on the plaintiff derives solely from the fact that the statement contained in it may be (or be found by a jury to be) false. Because Dun & Bradstreet is engaged in the dissemination of information in the content of which it has no interest other than as publisher, its communications are not "commercial speech" relegated to lesser First Amendment protection, but rather informational speech entitled to all the First Amendment safeguards articulated in *Gertz*.

Individuals and organizations that disseminate information—whether newspapers, broadcasters, disseminators of financial information like Dun & Bradstreet, or publishers involved in a variety of means and formats of communication like Dow Jones—disseminate facts. The facts may be of personal interest to the recipient, such as the birth, death and wedding notices in a newspaper; they may be of recreational or educational interest, such as sports statistics and announcements of cultural events; they may be of political interest, such as the results of elections; or they may be instructive or profitable to the recipient in guiding his own economic decisions. Examples of the last category are, of course, the business sections of virtually every newspaper, which typically reports on the earnings, sales, activities, or bankruptcies of the companies it covers, investor-oriented publications, such as *Barron's*, of interest to those hoping to profit from investments, and consumer magazines such as *Consumer Reports*, which offer assessments of consumer items to help a purchaser make an informed decision.

The recipient of the information buys it from the person or entity that disseminates it because the disseminator has specialized in obtaining, editing, and distributing the kind of information that the recipient wants to receive. Because factual

statements are capable of being wholly or partially false, and because a false statement may cause injury to reputation, the common law of the various States generally provides for recovery in defamation for damage caused to a plaintiff by a false factual statement about him. But the "commercial speech" cases have no bearing on any of this, not only because they deal exclusively with a governmental regulatory framework as demonstrated in Point III, infra, but because the element that makes "commercial speech" subject to limited regulation is not its capacity to inform or mislead but its significance as a legal, commercial or economic act.[5]

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5 In a footnote to its opinion in *Virginia State Board of Pharmacy* the Court suggested that certain attributes of "commercial speech" may "make it less necessary to tolerate inaccurate statements for fear of silencing the speaker." 425 U.S. at 772 n. 24. Two attributes of commercial speech described by the Court were that "[t]he truth of commercial speech . . . may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else," and also that commercial speech is "more durable" than other speech since "advertising is the *sine qua non* of commercial profits . . . ." *Id. See also Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 564 n. 6 (1980).

The communication at issue in this case—and the kind of commercial news and information disseminated by Dow Jones– share neither of these attributes. The information Dun & Bradstreet sent to five of its subscribers about Greenmoss, and similar information Dow Jones may supply to its readers and subscribers, is obviously not "about a specific product or service that [either] provides," and thus is "verifiable" only to the extent that, and in the same manner as, any news report is verifiable by a publisher. Moreover, financial and commercial information is inherently no more "durable" than any other kind of news information, since the economic interest of the speaker is not in selling a product about which the communication relates (such as is true with respect to an advertisement); rather, Dun & Bradstreet's and Dow Jones' economic interest—like that of any newspaper or other disseminator of information—derives solely from its success in the *process* of disseminating the information. In short, an exorbitant verdict could easily induce Dun & Bradstreet or Dow Jones to restrict

In the commercial speech cases themselves the Court has recognized the fundamental distinction between communication that is propositional or transactional on the one hand, and speech that is informational on the other. In *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), for example, the Court acknowledged the township's substantial interest in regulating the underlying conduct at issue—the induced sale of real estate based on racial fears or prejudices. The flaw in the ordinance struck down in that decision was its failure to restrict its impact to the transactional aspect of the activity it sought to control, and its impermissible impact on the "free flow" of information:

> The Council's concern, then, was not with any commercial aspect of 'For Sale' signs—with offerors communicating offers to offerees—but with the substance of the information communicated to Willingboro citizens.

Id. at 96.

Similarly, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, *supra*, 425 U.S. 748, the Court held that while a State "is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways," *id.* at 770, it may not suppress the dissemination of "information."

> It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.

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the amount or the kind of information they distribute, or dissuade others from entering into the marketplace in which Dun & Bradstreet and Dow Jones sell their information products, to the loss of those subscribers and potential subscribers who depend on such information in conducting their affairs. Unlike the regulation of commercial speech in *Virginia State Board of Pharmacy*, presumed and punitive damages imposed on the speech in this case raise a "fear of silencing the speaker."

Id. See also Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, supra, 447 U.S. at 563 ("The First Amendment's concern for commercial speech is based on the informational function of advertising").

This Court and the lower courts have thus applied the full protection of the First Amendment to speech on commercial subjects. Just last Term, this Court reviewed the sufficiency of the evidence before the trier of fact concerning the precise factual determination mandated by *Gertz* as the minimum prerequisite for presumed or punitive damages, namely, whether the speaker in question acted with "actual malice" within the meaning of *New York Times Co. v. Sullivan. See Bose Corp. v. Consumers Union of United States, Inc., supra*, ___ U.S. ___, ___ S. Ct. ___, 52 U.S.L.W. 4513. The Court concluded that there was insufficient evidence to show that an article about the technical performance of high fidelity speakers was written with "actual malice," and thus affirmed the Court of Appeals' decision to dismiss the complaint.[6]

There has never been any doubt in this Court that speech *about* commerce, economics or finance is entitled to full First Amendment protection. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra*, 425 U.S. at 761, 763, 765. *See also Abood v. Detroit Board of Education*, 431 U.S. 209, 231 (1977) ("cases have never suggested" that expression on economic matters "is not entitled to full First Amendment protection"); *United Mine Workers of America, District 12 v. Illinois State Bar Association*, 389 U.S. 217, 223

6 In *Bose*, the District Court concluded that the plaintiff was "a 'public figure' as that term is defined in *Gertz*," ___ U.S. at ___, ___ S. Ct. at ___, 52 U.S.L.W. at 4514, an issue which this Court did not review. *See id.*, ___ U.S. at ___ n. 8, ___ S. Ct. at ___ n.8, 52 U.S.L.W. at 4515 n.8. Whether or not plaintiff was a public figure, of course, would have had no bearing on the resolution of the case if the Court had concluded that constitutional protections were inapplicable to the kind of speech involved in that case.

(1967), quoting *Thomas v. Collins*, 323 U.S. 516, 531 (1945) ("a free press [is] not confined to any field of human interest"); *Thornhill v. Alabama*, 310 U.S. 88, 95, 102 (1940) (framers' "confidence in the power of free and fearless reasoning and communication of ideas" in search for, *inter alia*, "economic truth;" necessity for freedom of discussion to embrace "all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period").

And lower courts have uniformly treated speech about commercial, economic and financial subjects as fully protected under the First Amendment. In the federal courts *see, e.g., Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984) (access); *In re Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984) (access); *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5 (2d Cir.), *cert. denied*, 459 U.S. 909 (1982) (subpoena); *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980) (libel); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264 (3d Cir. 1980) (libel); *Southard v. Forbes, Inc.*, 588 F.2d 140 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979) (libel); *Orr v. Argus-Press Co.*, 586 F.2d 1108 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979) (libel); *Drotzmanns, Inc. v. McGraw-Hill, Inc.*, 500 F.2d 830 (8th Cir. 1974) (libel); *United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc.*, 404 F.2d 706 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969) (libel); *Simmons Ford, Inc. v. Consumers Union of United States, Inc.*, 516 F. Supp. 742 (S.D.N.Y. 1981) (libel); *In re Consumers Union of United States, Inc.*, 495 F. Supp. 582 (S.D.N.Y. 1980) (subpoena); *In re Forbes Magazine*, 494 F. Supp. 780 (S.D.N.Y. 1980) (subpoena); *Reliance Insurance Co. v. Barron's*, 442 F. Supp. 1341 (S.D.N.Y. 1977) (libel).

There is simply no significant distinction between the reporting of financial information by Dun & Bradstreet or Dow Jones and dissemination of information in other contexts that have traditionally received undiluted First Amendment protection. Even with respect to the limited category of "commercial

speech," as this Court has observed, the interest of the recipient "in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra*, 425 U.S. at 763. For this reason, society itself has a "strong interest in the free flow of commercial information." *Id.* at 764.

Courts and commentators alike have recognized that the "free flow" of credit information such as that distributed by Dun & Bradstreet is "indispensible." *Id.* at 765. *See* Testimony of Dr. Andrew F. Brimmer, former member of the Board of Governors of the Federal Reserve System, in "Economic Impact of Regulatory Delay in Commercial Credit Reporting," *The Impact of Commercial Credit Reporting Practices on Small Business, 1979 Hearings Before the Select Committee on Small Business, United States Senate*, 96th Cong., 1st Sess. (1979):

> The importance of credit in furthering trade and economic growth is widely known. As economic growth of the nation created wider markets, and transportation and communication advances furthered this process, the need to extend more credit in growing markets created a parallel need for information. *The role of credit information agencies in expanding the market and furthering economic growth is equally well known.*

Id. at 323-24 (emphasis added). *See also Mooney v. Davis*, 75 Mich. 188, 192, 42 N.W. 802, 803 (1889) ("these [credit] agencies have become almost a necessity in the transaction of commercial business. . . ."); P. Earling, *Whom To Trust: A Practical Treatise on Mercantile Credits* (1890) ("It may also be added that our present widely extended credit system is largely due to the labors of the [credit] Agencies, and that it is no longer a disputed question that they supply a want, and are indispensable to the public business"). The financial information involved here or other information of commercial significance to the recipient is of no less "potential interest and value" to the recipient, *Bigelow v. Virginia*, *supra*, 421 U.S. at

822, than the functionally similar speech in *Bose* or, for that matter, what was little more than gossip in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

If the Court were to rule that speech is entitled to a lesser degree of protection simply because of the "commercial or economic nature" of its content, it would open a Pandora's box requiring it to scrutinize the content of the speech involved in all defamation cases to determine the extent to which it was commercial or economic and the resultant level of protection. It was precisely what it viewed as a "case-by-case" approach, initially articulated by a plurality in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), that the Court explicitly rejected in *Gertz*:

> But this ["case-by-case"] approach would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an *ad hoc* resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application. Such rules necessarily treat alike various cases involving differences as well as similarities. Thus it is often true that not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority.

418 U.S. at 343-44.[7]

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7 The presumed economic motivation of the speaker is, of course, irrelevant to determining whether his speech is entitled to full First Amendment protection. While Dun & Bradstreet and Dow Jones presumably disseminate information in the hope of thereby making a profit, that is undoubtedly true of most newspapers, booksellers, broadcasters, or other disseminators of fact or opinion. For this reason, in *New York Times Co. v. Sullivan*, *supra*, 376 U.S. 254, the Court rejected a suggestion that the advertisement in question in that case was entitled to a lesser degree of protection, noting that the fact that "the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold." *Id.* at 266. As one commentator has noted,

(footnote continued on following page)

The dissemination of commercial and economic information is unquestionably entitled to full First Amendment protection. No First Amendment interest suggests any reason why the "broad rules of general application" articulated in *Gertz*, *supra*, 418 U.S. at 343-44, should apply in a limited or diluted fashion to speech that is "of a commercial or economic nature."

III. The "Commercial Speech Doctrine" Does Not Apply in a Defamation Action

Ten years ago, in *Gertz v. Robert Welch, Inc.*, *supra*, 418 U.S. 323, the Court explored in detail the limits imposed by the First and Fourteenth Amendments on a defamation action brought by a plaintiff who is neither a "public official" nor a "public figure." Rejecting the plurality's conclusion in *Rosenbloom v. Metromedia, Inc.*, *supra*, 403 U.S. 29, which had focused on whether the plaintiff in a defamation action was "a subject of public or general interest," *id.* at 43, the Court held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability . . . ." 418 U.S. at 347. But after concluding that "the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual," 418 U.S. at 345-46, the Court took an entirely different approach to the limits imposed by the First and Fourteenth Amendments on presumed or punitive damages, and the competing interests involved. Since the Court's analysis of these interests is central to the issues raised here, the entire line of reasoning should be considered:

> Economic motivation could not be made a disqualifying factor [from maximum protection] without enormous damage to the first amendment. Little purpose would be served by a first amendment which failed to protect newspapers, paid public speakers, political candidates with partially economic motives and professional authors.

D. Farber, *Commercial Speech and First Amendment Theory*, 74 Nw. U. L. Rev. 372, 382-383 (1979) (footnotes omitted).

For the reasons stated below, we hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved. It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. . . .

We also find no justification for allowing awards of punitive damages against publishers and broadcasters

held liable under state-defined standards of liability for defamation. In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence. In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.

Id. at 349-50.

This minimum test established by the Court in *Gertz* was both prescient and wise. The Court in 1974 foresaw the possibility of an explosion of multi-million dollar defamation verdicts such as that which has occurred within the last decade. Several of these are described in the brief *amicus curiae* of the *Washington Post* filed in this action; many of them involved presumed or punitive damages that were ultimately found by appellate courts to be in "wholly unpredictable amounts" or "bearing no necessary relation to the actual harm caused." The Court has had no occasion to limit the rule on punitive damages announced in *Gertz*, and, indeed, has relied on *Gertz* in subsequent discussion of punitive damages. *See, e.g., Smith v. Wade*, 461 U.S. 30, 103 S. Ct. 1625, 1636 (1983).

Beginning in the Term before *Gertz*, in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, supra*, 413

U.S. 376, and continuing through the decade that followed, the Court has, in an entirely separate line of decisions, grappled with a problem that is entirely different from that raised and decided in *Gertz*. In the "commercial speech" cases, the Court has attempted to accommodate within the limits of the First and Fourteenth Amendments the States' police power to regulate commercial and economic activity. Reasoning that "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity," *Ohralik v. Ohio State Bar Association, supra*, 436 U.S. at 456, the Court has recognized "the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Id.* at 455-56. In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, supra*, 447 U.S. 557, the Court distilled its "commercial speech" cases into a four-part test to determine the validity of a State's "regulatory technique," *id.* at 564, as applied to commercial speech.

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566.

The hallmark of all of the Court's "commercial speech" decisions is that they involve governmental attempts to ban, limit, or regulate commercial activity that only incidentally included speech; none of the commercial speech cases involved a defamation action. *See Bolger v. Youngs Drug Product Corp., supra*, ____ U.S. ____, 103 S. Ct. 2875 (application of 39 U.S.C. § 3001(e)(2) prohibiting mailing of unsolicited ad-

vertisements for contraceptives); *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) (application of village ordinance requiring a license for any business selling paraphernalia usable for drugs); *In re R.M.J.*, 455 U.S. 191 (1982) (application of a state judicial rule regulating advertising by lawyers); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (application of city ordinance regulating outdoor advertising displays); *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, *supra*, 447 U.S. 557 (application of public service commission regulation banning advertising by an electric utility); *Friedman v. Rogers*, 440 U.S. 1 (1979) (application of state statute prohibiting the practice of optometry under a trade name); *Ohralik v. Ohio State Bar Association*, *supra*, 436 U.S. 447 (application of judicial disciplinary rules to attorney solicitation); *In re Primus*, 436 U.S. 412 (1978) (application of judicial disciplinary rules to attorney solicitation); *First National Bank of Boston v. Bellotti*, *supra*, 435 U.S. 765 (application of a state criminal statute prohibiting political expenditures by corporations); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (application of judicial disciplinary rule to prohibit attorney advertising); *Carey v. Population Services International*, 431 U.S. 678 (1977) (application of state criminal statute prohibiting advertising of contraceptives); *Linmark Associates, Inc. v. Township of Willingboro*, *supra*, 431 U.S. 85 (application of township ordinance prohibiting "for sale" signs); *Virginia State Board of Pharmacy v. Virgina Citizens Consumer Council, Inc.*, *supra*, 425 U.S. 748 (application of state statute prohibiting licensed pharmacists from advertising the prices of prescription drugs); *Bigelow v. Virginia*, *supra*, 421 U.S. 809 (application of state criminal statute prohibiting advertisement for an abortion); *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, *supra*, 413 U.S. 376 (application of city ordinance prohibiting gender-discriminatory advertisements).

The Court has compared these "commercial speech" cases with earlier decisions upholding "the validity of reasonable

time, place, or manner regulations that serve a significant governmental interest . . . ," and which similarly apply only incidentally to speech. *Consolidated Edison Co. v. Public Service Commission of New York*, 447 U.S. 530, 535 (1980); *cf. Cox v. New Hampshire*, 312 U.S. 569 (1941) (licensing requirement for parades through city streets); *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (application of an anti-noise regulation to demonstrations). In short, the "commercial speech" decisions of this Court have exclusively involved challenges to governmental regulatory efforts. The classification of speech as "commercial" under the definitions quoted above, and the determination to accord "less protection to commercial speech than to other constitutionally safeguarded forms of expression," *Bolger v. Youngs Drug Products Corp.*, *supra*, ____ U.S. at ____, 103 S. Ct. at 2874, depended "on the nature both of the expression and of *the governmental interests served by its regulation*." *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, *supra*, 447 U.S. at 563 (emphasis added). Punitive damages in defamation suits self-evidently do not involve governmental "regulation" at all, but rather are punishment for speech because of its content. The commercial speech cases are thus inapplicable to any defamation action.

More importantly, a comparison of the rationale for the commercial speech decisions with the Court's reasoning in *Gertz* demonstrates that the "commercial speech" distinction provides no basis for limiting the minimum constitutional protection for defendants in defamation cases so painstakingly articulated in *Gertz*. Key to the Court's analysis of a State's effort to ban or regulate commercial speech are an assessment of the State's interest cited as "justification[]" for the regulation, *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, *supra*, 447 U.S. at 568, an analysis of the relationship between the State's interests and the regulation involved, *id.*, and an inquiry whether the regulation "is no more extensive than necessary to further the State's interest . . . ." *Id.* at 569-70. Emphasizing both that the State must articulate a real and significant state interest and must demon-

strate that it has adopted the narrowest means reasonably calculated to accomplish that interest, the Court has upheld certain narrowly drawn, carefully focused regulatory provisions, *see, e.g., Ohralik v. Ohio State Bar Association, supra*, 436 U.S. 447; *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., supra*, 455 U.S. 489, and has struck down other regulations where the regulation was not "narrowly drawn" to protect a "substantial interest." *In re R.M.J., supra*, 455 U.S. at 203.

By contrast, the Court's ruling in *Gertz* with respect to presumed damages was precisely that "the states have *no substantial interest* in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury," 418 U.S. at 349 (emphasis added), and similarly that "punitive damages are *wholly irrelevant to the state interest* that justifies a negligence standard for private defamation actions." *Id.* at 350 (emphasis added). Thus, there is nothing to be weighed.

Moreover, as the Court recognized in *Gertz*, presumed or punitive damage awards by jurors are the very antithesis of a "narrowly drawn" response to a sharply focused "substantial need." Instead, presumed and punitive damages are the result of "[t]he largely uncontrolled discretion of juries," *id.* at 349, may be based on bias or hostility, *id.*, and are generally "limited only by the gentle rule that they not be excessive," with the result that juries frequently assess punitive damages in "wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Id.* at 350.

By the very nature of their composition and the function they serve, juries cannot be expected to perform in any given case the careful balancing function that this Court has evolved over a decade in the commercial speech cases. Rather, the balancing of interests in defamation cases as a group was accomplished by the Court in *Gertz*, when it ruled that with respect to actual damages a private defamation plaintiff may recover on any state law theory based on fault, but that the

State's interest in protecting a private defamation plaintiff does not justify presumed or punitive damages—at least unless the plaintiff succeeds in showing "actual malice."

The commercial speech cases focus on regulating acts and recognize no state interest in regulating the content of informational speech. The analysis underlying these cases is inapplicable to a defamation suit and provides no basis for rethinking or revising the balance struck in *Gertz*.

IV. Presumed and Punitive Damages in Defamation Actions Violate the First and Fourteenth Amendments

The *Washington Post* demonstrates in its *amicus* brief filed in this action that while "*Gertz*'s double negative" prohibits the imposition of presumed or punitive damages "at least" if a defamation plaintiff does not prove "actual malice," the opinion does not expressly permit the recovery of such damages upon that showing. Its demonstration that the sheer size and frequency of such verdicts will chill protected speech is a strong one, and Dow Jones joins in the *Washington Post*'s argument that permitting the imposition of presumed or punitive damages on *any* showing presents a profound danger to free expression, particularly by unpopular speakers, that would violate the First and Fourteenth Amendments. It also agrees with the *Washington Post*, however, that the Court should not reach that issue in this case but need only decide whether the Supreme Court of Vermont erred in denying petitioner the minimum protection mandated by *Gertz*.

CONCLUSION

The judgment of the Supreme Court of Vermont should be reversed.

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Respectfully submitted,

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